NO. 83-1014

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1983

MARK BLUMENTHAL,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI ON
APPEAL FROM THE SUPREME COURT
OF ILLINOIS

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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1. Byers v. United States, 273 U.S. 28, 47 S.Ct. 248.
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3. Chimel v. Calilfornia, 395 U.S. 752, 89 S.Ct. 2034, (1969).
4. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, (1971).
5. Davis v. Mississippi, 394 U.S. 723 89 S.Ct. 1394 (1969).
6. Harris v. State, 452 U.S. 901, 101 S.Ct. 3025, 69 L.Ed. 2d 402.
7. Harrison v. United States, 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008, (1968).
8. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168.
9. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, (1948).
10. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961).

11. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980).

12. People v. Abney, 81 Ill.2d 159, 407 N.E. 2d 543 (1980).

13. People v. Eichelberger, 91 Ill. 2d 359, 438 N.E. 2d 140, (1982).

14. People v. Peter, 55 Ill. 2d 43, 303 N.E. 2d 398, (1973).

15. People v. Wilson, 60 Ill. 2d 235, 326 N.E. 378, (1975).

16. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, (1966).

17. Steagald v. United States, 102 S.Ct. 1642, (1981), 451 U.S. 216.

18. United States v. DI RE, 332 U.S. 581, 68 S.Ct. 222.

19. United States v. Rosselli, 506 F.2d 627, Seventh Circuit, (1927).

20. United States v. Rubin, 474 F.2d 262, 3rd Circuit, (1973).

21. Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969 (1970).

22. Wong Sun v. United States, 371 U.S. 473, 83 S.Ct. 403 (1963).

Statutes

United States Constitution, U.S.C.A., Amendments IV, V, VI, XIV.

Illinois Revised Statutes of 1981, Chapter 38, Section 107-2.

Illinois Revised Statutes of 1981, Chapter 38, Section 114-12.

REPLY BRIEF TO THE BRIEF FOR RESPONDENT IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner asks this Court permission to file this Reply Brief to respond to Respondent's novel contention in its Brief in Opposition that the neutral magistrate who reviewed the search warrant application, was also reviewing the probable cause issue for Petitioner's arrest, thus satisfying Payton's requirements for arrest warrants in routine felony arrests. Such was not the case, nor was this issue argued below.

STATEMENT OF FACTS

Petitioner wishes to rely upon his submitted statement of the case, found on page 13 of the Petition for Writ of Certiorari.

However, Petitioner would also like to take exception to the intemperate choice of words in Respondent's Brief in Opposition and the mis-description of the case contained therein. Petitioner concedes that as in most criminal cases and in particular the instant case, a personal and circumstantial tragedy did occur in this cause. Defendant regrets the circumstances of the offense; however, the precipitating events were not completely within Defendant's control and Petitioner-Defendant urges this Court to keep in mind that Defendant was found not guilty by a jury on the trial of this cause as to the primary offense of aggravated arson. The jury in returning a verdict of not guilty apparently agreed with the Defendant's evidence and contention that a retaliatory prank precipitated by another student's attack upon Defendant's girl friend, now wife, was the precipitator of the events in question which caused a fire and damage in the college dorm in question. Petitioner has never

attempted to excuse or make light of what he, himself has described as a stupid, immature and reckless act in response to an attack against his financee. The Respondent states that use of the Appellate Court's unsuitable and intemperate description of this case is in fact a mis-description and in the judgment of Petitioner in derogation of this Court's Rule 34(.6) by its repetition in the State's Brief and Opposition.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Because of the unique timing and sequential order of the searches, arrest, and eventual Trial Court suppression of part of the police searches in this case, the constitutional issues contested herein need or deserve to be reviewed by this Supreme Court, contrary to Respondent's contention in its Brief of Opposition. Petitioner has not found any previously decided cases with the exact search, arrest, and suppression order of events as occurred in this cause. Hence a novel issue for review may be present here which this court may wish to exercise its discretion to decide as per Supreme Court Rule 17(.1), and Rule 17(.1)(c).

Respondent's Brief in Opposition to Petitioner's Writ for Certiorari, adequately summarizes Petitioner's basic constitutional contentions on Page 6 and 7 of Respondent's Brief. That contention is that the Petitioner-Defendant's basic constitutional

rights under the 4th, 5th, 6th, and 14th Amendments were violated when quashed, suppressed evidence was used by the police to base its arrest of defendant upon. Such an illegal arrest should have been quashed and the resulting evidence flowing unattenuatedly from that arrest also suppressed and returned to Defendant as a matter of law under the line of cases flowing from Wong Sun v. U.S., 371 U.S. 473, 83 S.Ct. 403 (1963); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961); Davis v. Mississippi, 394 U.S.723, 89 S.Ct. 1394 (1969); Byers v. U.S., 273 U.S. 28, 47 S.Ct. 248; U.S. v. DI RE, 332 U.S. 581, 68 S.Ct. 222.

The Trial Court at the Pre-Trial Quash and Suppression Hearing, granted Defendant's Motion to Suppress Evidence Illegally Seized from Defendant's dorm room, but erroneously refused to quash the immediately ensuing arrest of Defendant in his dorm room, which arrest was clinched by evidence illegally observed or seized in that dorm room by the Illinois State

University police. See pages 65, 66, and 67 of Petitioner's Writ of Certiorari.

The convinction of Defendant based on evidence seized from Defendant's person during this illegal arrest, namely his fingerprints, which the police previously had no record of, is contrary to the rules of constitutional law as they have evolved from the previously cited cases of Wong Sun, Mapp, Davis, Byers, and DI RE. This conviction of Defendant based upon unconstitutionally seized evidence by the Illinois courts is in direct conflict with the aforementioned decisions of the U.S. Supreme Court, and deserves review by Defendant's Petition for Certiorari under this Court's rule 17(.1)(c) also.

This Court's ruling in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), was also violated by the arresting Illinois State University police when they entered Petitioner's dorm room without a warrant for his arrest, since there were no

no exigent circumstances present, necessitating such a warrantless entry. The I.S.U. police had previously "secured" or taken over Petitioner's dorm room without a warrant or probable cause at 7 a.m. that morning, refusing entry to Petitioner and everyone else. This type of immobilization or securing of Defendant's dorm room has been called a seizure by previous Illinois and United States Supreme Court decisions. People v. Peter, 55 Ill. 2d 443, 303 N.E. 2d 398 (1973); Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975.

If this warrantless police lock-in, lock-out, was not a constitutionally unreasonable search or seizure in itself, such an immobilization of Petitioner's dorm room was at least clear proof that no exigent circumstancs were present in this cause, because any evidence that might have been destroyed or removed from Petitioner's room was effectively sealed by this police takeover.

Despite the recent Illinois Supreme Court cases of People v. Abney, 81 Ill. 2d 159, 407 N.E. 2d 543. (1980), and People v. Eichelberger, 91 Ill. 2d 359, 438 N.E. 2d 140 (1982), which discussed Payton's ruling and its guiding principles extensively, the Illinois Supreme Court in this cause denied Petitioner's Leave to Appeal to that Court. Such denial by the Illinois Supreme Court on October 4, 1983, let stand the manifestly erroneous affirmance by the Illinois Appellate Court of the Trial Court's conviction of Petitioner therein, which was based upon evidence illegally seized from Defendant following his warrantless arrest in his dorm room.

Such actions by the Illinois Courts were clearly contrary to constitutional principles required in arrest and search procedures by the police since the Payton decision. Abney and Eichelberger, op. cited, p. 168, and p. 367, both respectively, state that the principles of the exigent circumstances rule enunciated in

Payton have been judicially engrafted on our Illinois arrest statute. Chapter 38, Section 107-2, Illinois Revised Statutes of 1981. Yet Petitioner's warrantless arrest in his room with no exigent circumstances present was allowed to stand by our Illinois courts in this cause.

Respondent's Brief in Opposition now attempts to say that Payton's principles were satisfied by the Illinois Appellate Court's action in reconstructing the determination of the amount of probable cause possessed by the I.S.U. police at the time of Defendant's arrest in his room at around 1 p.m., which had been secured by the police since 7 a.m. Respondent's Brief also misleadingly gives the impression on pages 7, 8, and 9, now, that the magistrate who issued the search warrants, was also acting on an arrest warrant application, or that a search warrant can serve the same purpose as an arrest warrant. Such was not the case, in fact, nor is it in law.

The search warrant applicant himself, I.S.U. police officer Donald Knapp, testified at the Pre-Trial Quash and Suppression Hearing, that he did not feel he had probable cause to arrest Petitioner until after the search of Defendant's room, which search was later quashed for lack of probable cause by the Trial Court Judge. The Trial Court Judge ruled at the Pre-Trial Hearing, timely Motioned for by Defendant in accordance with Illinois Revised Statutes of 1981, Chapter 38, Sec. 114-12, that the police possessed only a "mere suspicion" quantum of evidence prior to the police search of Defendant's dorm room.

Yet, this "mere suspicion" quantum of evidence was relied upon by the Illinois Appellate Court to justify Defendant's arrest as being based upon probable cause. Such a holding by the Illinois Appellate Court is in direct conflict with this Court's decision in Henry v. U.S., 361 U.S. 98. 80 S.Ct. 168, which held that an arrest with or without a warrant

must stand upon firmer ground than mere suspicion. Petitioner believes that it is incongruous and an error of law for the Illinois Appellate Court to hold that evidence insufficient to uphold a search warrant of Defendant's room can later be called sufficient to justify Petitioner's arrest, clinched on evidence seized during this quashed search.

Byers and DI RE, op. cited, have both ruled that an illegal search is not validated by what it turns up. Here Defendant's arrest was not clinched until the evidence illegally observed in Defendant's room was observed or seized by the I.S.U. police, which search was later quashed and suppressed. An illegal arrest should not be validated by what is discovered because of that arrest.

Steagald v. United States, 102 S.Ct. 1642, 451 U.S. 216, (1981), has recently ruled that the inconvenience of obtaining a search warrant at the same time as an arrest warrant was not that significant. Such a similar procedure

could have been followed by the Illinois State police in this cause since all of their investigation was done on a weekday during court hours in the same city as the county seat. The early morning securing of Defendant's room by the police and the continued presence of Defendant in his dorm room area during the day while the police were making their investigation and searches, clearly are important factual grounds requiring that Payton's principles requiring arrest warrants in such routine, non-exigent circumstances should have been followed by the I.S.U. police herein. See also Harris v. State, 452 U.S. 901, 101 S.Ct. 3025, 69 L.Ed. 2d 402. In United States v. Rubin, 474 F.2d 262, 3rd Circuit, (1973), on pages 266 and 267, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, (1969), and Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, (1970), are both discussed to show what kind of factual circumstances might require the police who have already

secured on arrest warrant, to also seek a search warrant for the home they will be serving their arrest warrant at. In Petitioner's case herein, counsel for same has found no other cases exactly like our facts which clearly show that an arrest warrant should also have been sought by the I.S.U. police at the time they applied for their search warrants.

Rubin goes on to state, on page 268, using this Court's delicate balancing of rights as discussed in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1829, (1966), Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, (1948), and Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, (1971), that even the mere presence of probable cause, which was in doubt in this cause, does not provide the exigent circumstances necessary to justify a search without a warrant. Since Payton, probable cause has not dispensed with the necessity for arrest warrants, either, in the absence of

exigent circumstances, in routine felony arrests.

Since Petitioner's dorm room had been secured, sealed, and taken over completely by the I.S.U. police at 7 a.m., the morning of the fire and investigation, Petitioner's case clearly fits within the boundaries of situations described in Rubin, on pages 266, and 268, citing Chimel and Vale, op.cited. In Chimel, op.cited, p.395 U.S. at 768 N. 16, and 89 S.Ct. 2034, this Court stated that there was no showing that it would have been unduly burdensome for the police to have also obtained a search warrant, to go along with their arrest warrant. In Vale, 399 U.S. at 35, 90 S.Ct. at 1972, this Court stated, in suppressing the illegally seized evidence there, that there was lack of any evidence suggesting that it was impracticable for the police officers to obtain a search warrant, as well as their arrest warrants.

With language such as this, Petitioner contends that this Court has definitely ruled that there is a difference between a search warrant and an arrest warrant, and that one doesn't replace the need for the other, or serves the same purposes, as Respondent's Brief in Opposition erroneously contends, which contention was not made by Respondent in any court proceedings below.

Under the rules and reasonings of the decisions of this Court in the aforementioned cases of Rubin, Chimel, Vale, Schmerber, Johnson, Coolidge, and Payton, et al, op.cited, Petitioner's arrest should have been quashed because of the absence of an arrest warrant and any exigent circumstances. See also United States v. Rosselli, 506 F. 2d 627 (1974), p. 631.

Without the fingerprint evidence seized from Defendant's person following his unlawful arrest in his room at the conclusion of the quashed search, the State possessed only

circumstantial evidence, which did not link Defendant personally to the crime being investigated. Hence the fingerprints and Defendant's testimony at trial in his own defense were illegally tainted because they came, and flowed solely and unattenuatedly from, the exploitation of Defendant's arrest, which should have been quashed. Harrison v. U.S., 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1968). No clear and convincing evidence was produced by the State at trial to prove that Defendant's fingerprints and testimony came from an independent source either, as required by Illinois law. People v. Wilson, 60 Ill. 2d 235, 326 N.E. 2d 378 (1975).

CONCLUSION

Wherefore, Petitioner asks this Court to grant his Petition for Certiorari for the foregoing reasons.

Respectfully submitted,
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